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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANTHONY GONZALES, Defendant and Appellant.	G055675 (Super. Ct. No. 17WF1075) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Robert Anthony Gonzales appeals from the judgment of conviction entered after a jury found him guilty of one felony count of unlawfully taking a vehicle and one misdemeanor count of driving on a suspended driver's license. His sole contention on appeal is that the trial court prejudicially erred by admitting evidence, under Evidence Code sections 1101, subdivision (b) and 352, that Gonzales had previously stolen cell phones on three separate occasions.[1] Because we conclude the trial court did not abuse its discretion by admitting the evidence of the prior theft-related incidents under sections 1101, subdivision (b) and 352, we affirm.

FACTS

I.

THE CHARGED OFFENSES

On May 5, 2017, Matthew Kundrat unlawfully took Hector Serna's gym duffel bag, containing the key fob to Serna's Lexus, from the men's locker room of a gym in Irvine. After working out at the gym, Serna discovered his duffel bag missing from the locker room; he walked outside the gym and found his Lexus also missing.

Seven days later, Officer Danny Mihalik of the Garden Grove Police Department was working as a traffic enforcement officer when he noticed a silver Lexus driving toward him and passing other vehicles by entering the center two-way turn lane which was a move, he testified, that constituted "a traffic code violation." Mihalik made a U-turn to follow the erratically-driven Lexus and commence a traffic stop. Mihalik contacted the driver of the Lexus whom he identified as Gonzales. Gonzales appeared nervous and persisted in stepping a foot out of the car despite Mihalik's orders that he not do so. Gonzales told Mihalik that his driver's license had been suspended and that he

[1] All further statutory references are to the Evidence Code unless otherwise specified.

was in the process of taking classes to get it back. Gonzales also handed Mihalik the title to the car; Mihalik noticed signatures on the title, but not Gonzales's signature. Mihalik noticed the car did not have a front or rear license plate and did not have a temporary registration in the front or rear window of the car.

Mihalik contacted dispatch to conduct a records search on the car. Dispatch informed Mihalik that the car had been stolen and Mihalik placed Gonzales under arrest. In the defense case, Gonzales's brother testified that he and Gonzales were in the business of buying and selling cars they found on websites like Craigslist. He further testified that Gonzales had purchased Serna's Lexus from an unidentified male for $5,000 and that Gonzales was on his way to sell the Lexus when he was arrested.

II.

PRIOR THEFT-RELATED INCIDENTS

Over Gonzales's objection, the trial court admitted evidence of Gonzales's prior theft-related incidents, summarized as follows. On March 9, 2011, Gonzales responded to Giang Dong Ly's advertisement on Craigslist offering to sell his iPhone 4 for $650. Ly agreed to meet Gonzales at a coffee shop in Garden Grove. During their meeting, Gonzales asked to see the iPhone Ly was selling. After Ly handed the iPhone to Gonzales, Gonzales ran away with Ly's iPhone without paying for it. Ly unsuccessfully tried to run after Gonzales and then immediately reported the incident to the Garden Grove Police Department.

Further investigation led investigators to Gonzales. After the theft of Ly's iPhone, Detective Steven Heine of the Garden Grove Police Department noticed an advertisement on Craigslist that used the same telephone number Ly had originally used to communicate with Gonzales about the sale of his iPhone. Heine called that number and arranged to meet with Gonzales for the stated purpose of purchasing a cell phone Gonzales was selling. When they met, Gonzales confirmed he was selling an iPhone which he showed to Heine, adding that the iPhone belonged to his brother.

After Gonzales was arrested and advised under *Miranda v. Arizona* (1966) 384 U.S. 436, he told Heine that he obtained the iPhone, which he intended to sell to Heine for $460, from one of three individuals from whom he bought stolen equipment like iPhones. He stated that the particular iPhone he showed Heine had not been stolen, but admitted it was not his brother's iPhone as he had previously represented. Gonzales had another phone with him that he understood was stolen; he told Heine he purchased the second phone from "Carlos" for $150. Gonzales stated that, after obtaining such equipment, he would use Craigslist to contact people who he knew could repair equipment cheaply and then he would resell the equipment on Craigslist. He admitted taking Ly's iPhone and selling it through Craigslist a few days later for $400.

On March 25, 2011, Gonzales contacted John Quang Huynh regarding Huynh's Craigslist advertisement that he was selling his iPhone 4. They agreed to meet at a coffee shop in Westminster. Huynh met Gonzales at the appointed time and place; Gonzales asked to see the iPhone 4 he was selling. After Huynh handed the iPhone 4 to Gonzales, Gonzales grabbed the iPhone 4 and ran away. Huyhn contacted the police.

In December 2012, Thao Trong Tran placed an advertisement on Craigslist that he was selling his Samsung Galaxy SII cellular phone. Gonzales contacted Tran and arranged for them to meet for the purpose of Gonzales purchasing the Samsung phone. Tran met Gonzales at the agreed upon location and, as Tran was holding the phone in his hand, Gonzales grabbed it and took off running without paying for it. Gonzales got into a car; Tran noted the license plate of that car. Tran immediately reported the incident to the Santa Ana Police Department and provided the license plate number of the car. Further investigation once again led to Gonzales. On December 17, 2012, Tran positively identified Gonzales in a photographic lineup as the person who stole his phone.

Officer Arturo Castorena of the Santa Ana Police Department interviewed Gonzales and read him his rights under *Miranda v. Arizona, supra,* 384 U.S. 436.

Gonzales admitted to Castorena that he had been the one to set up the meeting with Tran and that he took off with Tran's Samsung cell phone without paying for it.

PROCEDURAL HISTORY

Gonzales was charged in an information with: (1) unlawful taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a) (count 1); (2) receiving stolen property in violation of Penal Code section 496d, subdivision (a) (count 2); and (3) misdemeanor driving on a suspended/revoked license with a prior in violation of Vehicle Code section 14601.1, subdivision (a) (count 3). The information alleged, pursuant to Penal Code section 1203.085, subdivision (a), that, at the time count 1 was committed, Gonzales was on state prison parole pursuant to Penal Code section 3000 following a term of imprisonment imposed for a violent felony, as defined in subdivision (c) of Penal Code section 667.5. As to count 3, the information alleged that Gonzales had been previously convicted of violating Vehicle Code section 14601.2, subdivision (a). The information further alleged that pursuant to Penal Code sections 667, subdivisions (d) and (e)(1) and 1170.12, subdivisions (b) and (c)(1), Gonzales had been previously convicted of a serious and violent felony and that, pursuant to Penal Code section 667.5, subdivision (b), he had served two prior prison terms.

The jury found Gonzales guilty of counts 1 and 3. The trial court found the prior conviction allegation under Penal Code section 1203.085, subdivision (a) not true, but found the prior conviction allegation under Vehicle Code section 14601.2, subdivision (a) as to count 3 true. The trial court also found the prior strike and the two prior prison term sentencing enhancement allegations true.

The trial court struck the prior strike and the two prison priors for purposes of sentencing and imposed a total prison term of two years. Gonzales appealed.

DISCUSSION

Gonzales's sole argument on appeal is that the trial court prejudicially erred by admitting evidence of uncharged prior theft-related incidents under sections 1101, subdivision (b) and 352. He argues the trial court's error also constituted a violation of his right to due process under the Fourteenth Amendment to the United States Constitution. We review the trial court's evidentiary ruling for abuse of discretion. (*People v. Davis* (2009) 46 Cal.4th 539, 602.) We conclude the trial court did not abuse its discretion.

Section 1101, subdivision (a) prohibits admission of evidence of a person's character, including evidence in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. The exceptions to the bar on admissibility of evidence of uncharged acts are set forth in section 1101, subdivision (b), which states in relevant part: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

"'Section 1101, subdivision (b) allows evidence of uncharged misconduct when it is relevant to establish a material fact other than the person's bad character or criminal disposition. [Citation.] The admissibility of such evidence turns largely on the question whether the uncharged acts are sufficiently similar to the charged offenses to support a reasonable inference of the material fact they are offered to prove.'" (*People v. Burnett* (2003) 110 Cal.App.4th 868, 880-881.)

Evidence of a defendant's uncharged misconduct, if relevant under section 1101, subdivision (b), is subject to section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) Section 352 gives the trial court discretion to exclude evidence if its probative value "is substantially outweighed by the probability that its admission will . . . necessitate undue consumption of time or . . . create substantial danger of undue

prejudice, of confusing the issues, or of misleading the jury." To be admissible, evidence of a defendant's uncharged misconduct "must have substantial probative value that is not greatly outweighed by the potential that undue prejudice will result from admitting the evidence." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.)

In count 1, Gonzales was charged with unlawful driving or taking of a vehicle without the consent of the owner in violation of Vehicle Code section 10851, subdivision (a), which provides in part: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense."

Before trial, the prosecution filed a motion in limine seeking the admission of evidence regarding Gonzales's prior theft-related conduct under section 1101, subdivision (b). Gonzales opposed the motion, arguing the proffered evidence was inadmissible under sections 1101, subdivision (b) and 352 because his prior conduct was too dissimilar to be relevant in the instant case.

At the hearing on the motion, the prosecutor argued evidence of Gonzales's prior theft-related conduct was important to show Gonzales "is not just any other person who could have been fooled by an internet scam. The defendant in his prior iPhone business admitted that he had three buddies that he would go knowingly purchase stolen items from. And similarly here, it is highly likely, based on the conduct, that the defendant, because of this internet business, has people that he is knowingly buying cheap cars from knowing that they're stolen to re-sell them at a profit. [¶] And with regards to [defendant's] counsel's argument that the items are different, the only thing that means is that the defendant has graduated from selling smaller, cheaper items to items that will make him more money. But the behavior is the same. The whole online

business that he admits to having is the same. And, again, when it comes down to knowledge, and the entire argument is going to be that the defendant had no way of knowing that the car was stolen because he receives some type of fraudulent title from the person he bought it, well, the defendant should have known based on his pattern of behavior. This is what he engages in. This is his plan. He buys cheap items knowing—or should have known that they were stolen, and then he resells them on the internet at a profit a few days later."

The trial court granted the motion to admit the section 1101, subdivision (b) evidence with the caveat that no witness would be allowed to testify that Gonzales pushed any of his victims when stealing an iPhone because the court did not "see any reason to get into what the jury may see as a crime of violence." The court explained its ruling in part: "The issue in this case is knowledge. The whole issue, the whole question is, is the defendant just an innocent person who purchased a car from somebody legitimately? He has some legitimate DMV paperwork and it turns out the car is stolen. And that's a big surprise to Mr. Gonzales. That's the way this case would look if the court never allowed the People to present their theory of the case, which is that the defendant is involved in buying and/or obtaining and reselling stolen goods and has been for some time. That's the theory of the case here, and I think that it—this evidence is extremely relevant in this case." The court further stated: "[The People's] theory is the defendant is involved in what he's always been involved in, which is obtaining illegally or legally items and reselling them on the internet. And I think there will be evidence that the defendant was in the business of buying and reselling cars in this case. I think that's highly likely."

The trial court noted that while some of the prior theft-related incidents were five years old, they were not significantly remote in time and the fact that there were three separate instances further supported the prosecutor's argument the conduct leading to the charged offenses was part of a continuing pattern, making the proffered

evidence "extremely relevant." The court stated that the prejudicial impact of the evidence did not substantially outweigh its probative value, stating, "the bottom line is that I think the jury can determine whether the defendant was acting illegally here, as he had done when he stole cell phones and re-sold them." The court explained it was not concerned the evidence would have "such an emotional impact on the jury" that they would not be able to "make that determination." The court further noted, "I think that's ultimately the issue here. Depriving the People of this evidence would change the issue entirely into whether there is any evidence the defendant knew the car was stolen."

The court observed that while putting on evidence regarding the prior theft-related incidents would take time, it would not involve an undue consumption of time, and would not otherwise substantially outweigh the probative value of that evidence.

The trial court stated its ruling was that the evidence of prior theft-related incidents would be admissible to show knowledge, intent, and the absence of mistake. The court also stated it would take under submission the admissibility of the evidence to show a common plan or scheme pending the presentation of evidence Gonzales was in the business of buying and selling cars.

The trial court did not abuse its discretion by concluding the evidence regarding the prior theft-related incidents was admissible under section 1101, subdivision (b) as it was highly relevant to show Gonzales's knowledge and intent. It was also highly relevant to show the absence of any mistake that Gonzales was aware the Lexus he was driving before he was arrested by Mihalik, which he was intending to sell, had been stolen. As anticipated by the trial court, evidence showing Gonzales was in the business of buying and selling cars was admitted at trial. That evidence showed even greater similarity between Gonzales's charged conduct and the prior-theft related incidents, which involved the selling of stolen cell phones, so as to show a plan within the meaning of section 1101, subdivision (b).

The record shows the trial court expressly exercised its discretion under section 352 in determining that the probative value of that evidence was not substantially outweighed by the probability its admission would necessitate an undue consumption of time or create the substantial danger of undue prejudice, of confusing the issues or misleading the jury. The court acknowledged that putting on evidence of the prior theft-related offenses would require some time, but not an undue consumption of time. The presentation of that evidence at trial took even less time than that anticipated by the court as the parties stipulated to many of the facts underlying those offenses.

Gonzales argues the evidence presented regarding the prior theft-related incidents that was offered in addition to the parties' stipulations was improperly cumulative. We disagree. The relatively brief testimony offered by the three witnesses regarding the prior theft-related incidents related additional relevant information about those incidents, including Gonzales's statements and admissions made in connection with the investigations related to the prior incidents. The trial court also noted the evidence was not of a kind that would likely confuse the issues or mislead the jury.

In the opening appellate brief, Gonzales argues the prior theft-related incidents were not sufficiently similar to the conduct underlying the charged offenses to warrant admissibility under 1101, subdivision (b) and evidence of such incidents should not have been admitted under section 352. Gonzales argues "[t]here was no evidence that [Gonzales] bought stolen phones and then resold them."

But Heine testified about Gonzales's statements to him regarding the theft of Ly's iPhone as follows:

"Q And what, if anything, did the defendant tell you about what he was doing at the [restaurant] on that day?

"A He was there to sell me the phone. He told me that the phone that he was going to sell me was a phone that he obtained from one of three individuals that he normally buys equipment like this from.

"Q And did he—

"A But he couldn't tell me specifically which individual he bought—he actually bought that phone from.

"Q And did he tell you what he meant by these individuals that he buys this sort of equipment from?

"A Yes.

"Q What did he tell you?

"A He tells me—he told me that *the equipment that he buys or the equipment that he buys from these individuals, these items are stolen*.

"Q And so he was aware of that fact?

"A Yes." (Italics added.)

Heine further testified that Gonzales told him that Gonzales "would obtain equipment like iPhones, contact other people he knew on Craigslist who would repair these items cheaply and then resell them on Craigslist."

Thus, the trial court did not abuse its discretion by admitting the evidence of the prior theft-related incidents under sections 1101, subdivision (b) and 352. Because Gonzales's constitutional argument is entirely dependent on the success of his argument that evidence was improperly admitted under sections 1101, subdivision (b) and 352, it is also without merit.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.